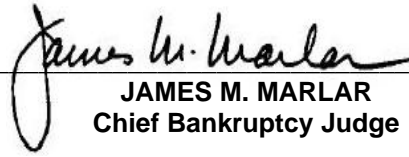


SIGNED.



Dated: September 22, 2010

  
JAMES M. MARLAR  
Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 11
FIRST MAGNUS FINANCIAL	)	No. 4:07-bk-01578-JMM
CORPORATION,	)	Adversary No. 4:09-ap-00211-JMM
Debtor.	)	<b>MEMORANDUM DECISION</b>
LARRY LATTIG, LITIGATION	)	<b>(James Warner Summary Judgment on</b>
TRUSTEE FOR THE FIRST MAGNUS	)	<b>Claims Related to Post-petition</b>
LITIGATION TRUST,	)	<b>Transfers of Abandoned Equipment;</b>
Plaintiffs,	)	<b>Counts 41-43 and 45-48)</b>
vs.	)	
STONEWATER MORTGAGE	)	
CORPORATION; et al.	)	
Defendants.	)	

Before the court is the motion for summary judgment filed by Defendant James Warner (ECF No. 161). The matter was briefed, and then argued on July 15, 2010. Thereafter, supplemental papers were filed. The court has reviewed all of the relevant filings, and now rules.

**ISSUE**

Are there genuine and material issues of fact which would require certain counts to proceed to a trial on the merits?

1 **CONCLUSION**

2  
3 Summary judgment will be GRANTED.  
4

5 **DISCUSSION**

6  
7 **A. The Summary Judgment Motion**

8  
9 Mr. Warner seeks summary judgment on Counts 41-43 and 45-48 of Plaintiff's Second  
10 Amended Complaint. The counts, as they relate to post-petition actions of Mr. Warner, allege:

11 Count 41 That Mr. Warner improperly came into possession of  
12 confidential and proprietary information belonging to First  
13 Magnus Financial Corporation ("Debtor" or "FMFC"). That Mr.  
14 Warner's actions unlawfully misappropriated Debtor's property.

15 Count 42 That Mr. Warner converted property belonging to the Debtor.

16 Count 43 That Mr. Warner violated fiduciary duties to FMFC by a scheme  
17 designed to deprive FMFC of its valuable property interests.

18 Count 45 That Mr. Warner unjustly enriched himself by acquiring  
19 property of FMFC which contained "confidential information."

20 Count 46 That the remedy of constructive trust should be imposed on  
21 former FMFC property which had been transferred to Mr.  
22 Warner.

23 Count 47 That Mr. Warner conspired with others to wrongfully convey  
24 FMFC's property to others.

25 Count 48 That Mr. Warner aided and abetted other defendants in  
26 transferring valuable Debtor assets to others.  
27  
28

1 **B. Bankruptcy Filing**

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3 The Debtor filed a Chapter 11 case on August 21, 2007. At that time, unable to  
4 continue to operate, it began the process of winding up its affairs. Eventually, it proposed a second  
5 amended liquidating plan on January 4, 2008 (Administrative ECF No. 1065), which was confirmed  
6 by the court on February 28, 2008 (Administrative ECF No. 1589).

7 During the course of the Chapter 11 case, the Debtor functioned as a debtor-in-  
8 possession ("DIP"). 11 U.S.C. § 1107. No trustee was appointed, and the DIP functioned as a  
9 fiduciary for the estate and its creditors. As a DIP, the Debtor entity enjoyed, among other things,  
10 many of the powers available to an independent trustee. 11 U.S.C. §§ 1106; 1107.

11 Shortly after the bankruptcy filing, the court appointed counsel for the DIP  
12 (Administrative ECF No. 133), and, in addition, after the U.S. Trustee formed an unsecured  
13 creditors' committee, appointed counsel to act on behalf of that constituent group (Administrative  
14 ECF No. 143).

15 During the course of the Chapter 11 case, the DIP, with the collaboration and consent  
16 of the unsecured creditors' committee, began the arduous process of evaluating what assets the  
17 Debtor had, deciding which of those assets had realizable value to the estate, and making decisions  
18 to slough off assets which did not appear to have value. In the latter instances, the DIP sought court  
19 approval whenever it felt that particular assets should leave the estate. These decisions came in  
20 many forms. Sometimes, the DIP affirmatively petitions the court for abandonment under § 554;  
21 sometimes the DIP does not contest motions for stay relief so that secured creditors can enforce their  
22 rights (§ 362); sometimes the DIP rejects leases outright (§ 365); and occasionally, the DIP sells  
23 assets at duly noticed sales (§ 363).

24 Each time the court enters an order for one of these types of actions, the entry of such  
25 an order becomes final if it was not appealed within 10 days. FED. R. BANKR. P. 8002.<sup>1</sup>

26  
27  
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<sup>1</sup> The time period has been expanded to 14 days.

1 **C. Mr. Warner's Position**

2  
3 Mr. Warner maintains, and the undisputed facts reveal, that he was never employed  
4 by the Debtor. As a financial consultant for Magnus Corporation, his role, relating to the purchase  
5 of various pieces of furniture and equipment at Chase Bank's UCC sale, was to act as the agent for  
6 FM Realty, the successful purchaser. FM Realty paid \$239,903.09 to purchase that property from  
7 Chase (Ex. K to Mr. Warner's Statement of Facts, ECF No. 162).

8 Earlier, that property had been abandoned by the Debtor, and Chase, as the secured  
9 creditor, had taken possession of it. Then, Chase exercised its sale remedies under the UCC, and  
10 sold the collateral to FM Realty, applying the sales proceeds to the debt of the Debtor.

11 These facts are not in dispute.

12  
13 **D. Mr. Lattig's Position**

14  
15 Larry Lattig, the "Litigation Trustee," argues that property which was transferred to  
16 Chase, pursuant to the abandonment order or orders, was in excess of the authority granted. Mr.  
17 Lattig then maintains that same property was surreptitiously imbedded within the abandoned items,  
18 and then bought back by the Debtor's affiliate, FM Realty, with the assistance and knowing  
19 participation of Mr. Warner.

20  
21 **E. The Essence of the Claims Against Mr. Warner**

22  
23 Each of the summary judgment counts against Mr. Warner rely on scienter, state of  
24 mind and a knowledge that he and others had to covertly steal, appropriate or purloin confidential  
25 information contained on computer hardware which was later sold by Chase at a UCC sale, back  
26 to an affiliate of the Debtor.

27 To this particular conduct, Mr. Warner has provided, *inter alia*, his affidavit which  
28 states:

- 1           7) To my knowledge, none of the types of "confidential information"  
2 identified in the Second Amended Complaint were on any of the  
3 equipment I helped FM Realty purchase from Dovebid [Chase's sales  
4 agent].  
5           8) To my knowledge there was no agreement among any of the defendants  
6 to misappropriate or convert assets of FMFC, and I certainly was not  
7 a party to any such agreement.

8 (Mr. Warner's Affidavit, Ex. A to Statement of Facts, ECF No. 162.)

9 As Mr. Lattig's causes of action, on the counts at issue, relate to a state of mind, it is  
10 Mr. Lattig's burden to present proof that specifically or inferentially creates a factual issue which  
11 would cast doubt upon Mr. Warner's statements that he never had a knowing role in such a scheme  
12 (if such a scheme ever existed).

13  
14 **F. Mr. Lattig's Response to Motion for Summary Judgment**

15 In response to Mr. Warner's straightforward affidavit and other undisputed facts, Mr.  
16 Lattig has produced:

- 17           1. The affidavit (ECF Nos. 193 and 293) of Jamie Welton, Mr. Lattig's  
18 litigation attorney, which sets forth a series of facts, but which do not  
19 contradict the aforementioned paragraphs 7 and 8 of Mr. Warner's  
20 affidavit. Nor does Mr. Welton's assemblage of facts create a reason to  
21 infer that Mr. Lattig's legal theories have a factual foundation.  
22           2. Mr. Welton's affidavit certifying certain parts of deposition transcripts  
23 regarding the issue of the "wiping" of information (ECF No. 193).  
24           3. Portions of depositions from, among others, Eric Rodziewicz, Karl  
25 Young, James Warner and Dominick Marchetti. There may be other  
26 persons in the batch of partial transcripts, but only the witnesses named  
27 are identified.  
28

1 **G. Post-Hearing Supplements**

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3 After the summary judgment arguments on July 15, 2010 (ECF Nos. 207 and 206),  
4 the parties submitted additional briefing and evidence concerning whether any Debtor proprietary  
5 information was even on the software transferred to Chase's UCC sales agent, Dovebid. Mr. Warner  
6 produced several documents, including an affidavit of Eric Rodziewicz (ECF No. 209), which  
7 tended to prove that all of the Debtor's proprietary information had been removed ("wiped") from  
8 the hardware sent to Dovebid.

9 In response, Mr. Lattig argues that the computers which (apparently) never left the  
10 offices were not "wiped" (ECF Nos. 285-286).

11 What Mr. Lattig has not produced, however, is some evidence that, in fact, Debtor's  
12 confidential and proprietary information had not been "wiped" from the hardware and software  
13 transferred to Chase's UCC agent (Dovebid). Or, that such proprietary information is in use today  
14 by StoneWater, G-Force 1 or some other affiliated entity. Or, that Mr. Warner had some clearly  
15 active and affirmative role in purloining or participating in a surreptitiously and knowing  
16 orchestration of events designed to secretly move the Debtor's proprietary software from the Debtor,  
17 through Chase and Dovebid, to FM Realty. Or, that there was any monetary damage done to the  
18 Debtor.

19  
20 **CONCLUSION**

21  
22 After reviewing all of the evidence submitted, the court must conclude that Mr.  
23 Lattig's evidence, or batches of evidence grouped together, does not establish a case on the legal  
24 theories set forth in Counts 41-43 and 45-48. And, in the context of Mr. Warner's motion for  
25 summary judgment, Mr. Lattig been unable to present a single fact which either directly or  
26 inferentially suggests that the legal theories asserted against Mr. Warner necessitate a full trial on  
27 the merits. Mr. Lattig is unable to establish an affirmative legal case against Mr. Warner.  
28

1 Mr. Lattig's body of facts, while apparently intending to "connect the dots" in such as  
2 a way as to encircle Mr. Warner, do not end in that result. The dots simply do not connect in any  
3 manner to show either a conspiracy, or a conspiracy that Mr. Warner participated in. The theories  
4 fail for lack of evidence.

5 Accordingly, Mr. Warner's motion for summary judgment as to the claims presented  
6 against him in Counts 41-43 and 45-48, shall be GRANTED, and those claims shall be dismissed,  
7 with prejudice. A judgment, with Rule 54(b) language, will terminate this phase of the litigation.

8  
9 DATED AND SIGNED ABOVE.

10  
11 COPIES to be sent by the Bankruptcy Notification  
12 Center ("BNC") to all parties to this adversary proceeding  
and:

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14 Fennemore Craig PC  
One S. Church, Suite 1000  
Tucson, AZ 85701-1627

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